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IN THE

Supreme Court of the United States

October Term, 1958

No. 302

GLADYS L. MATTHEWS, ADMINISTRATRIX OF THE ESTATE OF THEODORE A. MATTHEWS,
Petitioner

v.

PHILLIP MATTHEWS, ADMINISTRATOR, ESTATE OF SAMUEL MATTHEWS, DECEASED,
Respondent

PETITION FOR WRIT OF CERTIONARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

GLADYS L. MATTHEWS, ADMINISTRATRIX
OF THE ESTATE OF THEODORE A. MATTHEWS,
Petitioner

v.

PHILLIP MATTHEWS, ADMINISTRATOR,
ESTATE OF SAMUEL MATTHEWS, DECEASED,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To: The Honorable The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered June 26, 1958 affirming orders of the United States District Court denying petitioner's Petition to Revoke Letters of Administration granted to respondent and denying petitioner's Motion to Reconsider said order.

OPINIONS BELOW

There was no opinion in the United States District Court for the District of Columbia, but the Court made

findings of fact in its order of July 24, 1957, which are found in the certified transcript of record submitted herewith. (J.A. 55)

The opinion of the United States Court of Appeals rendered June 26, 1958 is not yet reported but is contained in the certified transcript of record submitted herewith at page 73 and is appended to this petition.

There was no petition for rehearing.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was dated and entered June 26, 1958. There was no petition for rehearing.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

I

Whether the Court of Appeals erred in presuming a common law marriage between the decedent and respondent's mother in light of the fact that respondent's mother left the decedent and subsequent to said common law marriage entered into a ceremonial marriage without benefit of a divorce, during decedent's lifetime?

II

Whether the Court of Appeals deprived petitioner of property without due process of law when it presumed a common law marriage without inquiring into the facts constituting the common law marriage on the ground that respondent's mother had waived her rights in decedent's estate as such inquiry was fundamental to petitioner's property rights?

III

Whether the Court of Appeals erred in presuming legitimacy of respondent in the absence of a valid marriage as our code provides legitimation where there is a marriage and subsequent acknowledgment of issue.

STATUTES INVOLVED

Title 18, Section 106, D.C. Code (1951) provides:

> If any man shall have a child or children by any woman whom he shall afterwards marry, such child or children; if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be legitimated and capable in law of inheriting and transmitting heritable property as if born in wedlock.

Title 18, Section 709, D. C. Code (1951) provides:

> If there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant, or father or mother of the intestate, the said brother, sister, or child or descendant of a brother or sister shall have the whole.

Title 20, Section 204, D. C. Code (1951) provides:

> If the intestate leave a widow or surviving husband and a child or children, administration, subject to the discretion of the court, shall be granted either to the widow or surviving husband or to the child, or one or more of the children qualified to act as administrator.

Title 20, Section 207, D. C. Code (1951) provides:

> If there be neither widow or surviving husband, nor child, nor grandchild, nor father, nor mother to act, brothers and sisters shall be preferred.

Amendment V to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On May 8, 1957, respondent filed a Petition for Letters of Administration of the Estate of Samuel Matthews, deceased (J.A. 1); alleging among other things that decedent had died April 16, 1957, leaving surviving as his next of kin and heirs at law, respondent, his sister, Bernice Gordon and Theodore A. Matthews, his brother, of whom your petitioner was then Conservator, and that the decedent was divorced; and further alleging that decedent's brother Theodore and respondent's sister, Bernice had been served and had filed waivers consenting to nominal general bond. On May 27, 1957, respondent filed an Amended petition (J.A. 4) stating that his father left a widow, Irene Matthews Bailey, who had filed a waiver of all interest in his estate (J.A. 8) and a daughter, Bernice Gordon who had waived over to respondent consenting to Administration under Special Bond. On May 28, 1957 an Order granting Administration with Special Bond was entered. (J.A. 8). Thereafter, upon representation of petitioner's then counsel, Robert M. Williams, bond was withheld by the office of Register of Wills, D. C. (J.A. 9) pending petitioner's filing a Petition to Revoke Letters of Administration. On May 31, 1957 a Petition to Revoke Letters of Administration was filed by petitioner (J.A. 12), then conservator of the estate of Theodore A. Matthews, alleging among other things that Theodore A. Matthews, brother of decedent had never been served nor filed a waiver to respondent; that Samuel Matthews left

only one heir at law and next of kin, namely his brother, respondent's then ward, Theodore A. Matthews; that the Administrator was not a son capable of inheriting under our law and qualifying as Administrator as his mother and the decedent had never been married; that as a matter of fact respondent's mother is presently married to another person and has been so married for a number of years during decedent's lifetime; and that petitioner be appointed in behalf of her ward, Theodore A. Matthews, the only heir at law of Samuel Matthews, deceased. An affidavit in reply was filed by respondent alleging among other things, that decedent and respondent's mother Irene Bond Bailey were parties to a valid common law marriage and that although his mother had married during decedent's lifetime her failure to obtain a divorce was based on her misconception of the law (J.A. 20); and she waived all interest in his estate. Thereafter petitioner filed a supplemental affidavit in support of her petition to Revoke Letters of Administration in which reference was made to the conservatorship proceedings on her ward Civil Action #1107-56 in which decedent when being interviewed by her ward's then lawyer, Russell Morris, denied ever being married to respondent's mother (J.A. 53) in the hearing of George Ransome who was present during said interview. Thereafter, the matter was heard in Motions Court July 24, 1957 and on that date Judge Wilkins entered an order denying petitioner's Petition to Revoke with prejudice. (J.A. 55). In his Order he found that a valid common law marriage existed between decedent and respondent's mother and that respondent and his sister Bernice Gordon are legitimate. Thereafter a Motion to Reconsider said Order denying Petition to Revoke Letters of Administration was filed August 1, 1957 (J.A. 56) in which petitioner averred the court erred among other reasons by presuming a valid common law marriage between decedent and respondent's mother when respondent's mother's own act of marrying during decedent's lifetime contravened

the court's finding of a valid common law marriage between her and decedent. On August 8, 1957, respondent filed a Reply to the Motion to Reconsider Petition to Revoke Letters of Administration. (J.A. 66). On October 1, 1957 the Motion to Reconsider etc. was denied without a hearing. (J.A. 70). From the Judgment denying Petition to Revoke Letters of Administration with prejudice and order denying Motion to Reconsider said Judgment, timely Notice of Appeal was made and an appeal accordingly processed.

While the proceedings were pending in the Appellate Court petitioner's ward, whom she had married in October, 1956 died and after the grant to Petitioner of Letters of Administration on the Estate of Theodore A. Matthews, on April 16, 1958, she was substituted as Administratrix of the estate of Theodore A. Matthews, appellant. A copy of said order of substitution of parties on account of death is contained in the certified transcript of record submitted herewith at page 77.

ARGUMENT

I

The chief issue in the case was whether respondent, administrator below, was entitled to Letters of Administration on the estate of Samuel Matthews as to be so entitled he would have to be the child of the decedent. D.C. Code Title 20, Section 204, (1951). Otherwise, petitioner, administrator of the estate of decedent's brother, Theodore A. Matthews, would be entitled to Letters of Administration. D. C. Code, Title 20, Section 207, (1951). It is settled in this jurisdiction, that a "child" as referred to in Title 20, Section 204 means a legitimate child. Di Giovanni v. Di Giovanantonio 98 App. D. C. 147 n. 1, p. 148. It is also well settled in our jurisdiction that in order to legitimate a child, marriage with the father and his subse-

quent acknowledgement of the child must be shown. D. C. Code, Title 18, Section 106. (1951); Blethyn v. Badger 80 F. Supp. 962.

It is the petitioner's contention that no legal marriage was ever entered into between respondent's mother Irene Bond Bailey and the decedent; that the relationship was admittedly illicit in its inception, by the affidavit of the respondent's mother, (J.A. 39); that only her self-serving statement in that same affidavit is offered to show a change in the relationship; and that in 1937, six years after she left the decedent, Irene Bond entered into a ceremonial marriage with George Bailey (J.A. 51), which action overcomes all presumptions of a prior common law marriage with decedent. The Court below states that there was no legal impediment to the marriage and that they lived together as man and wife until their separation. (App. 15). The Court of Appeals then went on to nullify petitioner's chief attack on the legality of a common law marriage in this case, the subsequent ceremonial marriage of respondent's mother without a divorce, by stating that since respondent's mother waived all claim as "widow" in this case, they were not called upon to adjudicate her status. (App. 15).

The weight of authority is contrary to the presumption of a valid common law marriage in this case. Where an actual marriage by one of the parties to an alleged common law marriage with a third person takes place during the lifetime of the other party to alleged common law marriage, the presumption of a common law marriage is met and overcome. One of the leading cases on this subject is Jones v. Jones, 48 Maryland St. Reports 391, where appellant attempted to establish his legitimacy in an administration proceeding by proving a common law marriage between the decedent and his mother. The Court in holding that appellant was not the lawful issue of the decedent and appellant's mother stated at pages 397, 398:

> ". . . if Andrew D. Jones, decedent (sic) was in fact married . . . during the life of Hennie, the mother of the appellant, all mere presumptions of a previous marriage of Andrew with Hennie, founded simply upon habit and repute are at once overthrown. . . . The reasoning upon which this decision rests is that in such a case the presumption of a marriage arising from cohabitation and repute is met and overcome by the stronger presumption that a man will not incur the guilt of felony and the danger which attends it by marrying another woman during the life of one to whom he had previously been lawfully married . . ."

To the same effect are: Senser v. Bower, 1 Penn. Rep. 450; Gaines v. Relf 53 U.S. 472, in which the Supreme Court in circumstances somewhat similar, where one of the parties to an actual ceremonial marriage confessed or declared he had another wife living said in the syllabus:

> "To hold that either of the parties could by mere declaration establish the fact that a marriage is void would be an alarming doctrine".

Likewise, in Schwingle v. Reifer, 135 S. W. 194 the court held:

> ". . . The weight of authority, and the decisions . . . support the proposition that the presumption of an actual marriage from the fact of continued cohabitation is rebutted by the fact of a subsequent permanent separation, without apparent cause, and the actual marriage soon after of one of the parties . . ."

Similarly, in Maher v. Maher, 56 N. E. 124, where an appeal was presented to determine the status of a common law widow, who alleged that decedent's subsequent ceremonial marriage to another person following their separation was invalid, the court in declaring the lower court's ruling that alleged common law wife was lawful widow was erroneous, said at page 126:

> "Cohabitation and repute do not alone constitute the marriage as that can only depend on the mutual consent of the parties. The recognition of the marriage

relation by the parties themselves and by friends and relatives . . . being the mere manifestations that the parties have consented to contract . . . causes those facts to only raise a presumption of the actual contract . . . a presumption of that character may be overcome by other presumptions springing from their acts after cohabitation between them has ceased . . ."

I

To the same effect are In re Wallace's Estate 25 Atl. 260; Norman v. Goode, 38 S. E. 317; and Jenkins v. Jenkins, 83 Ga. 283; 9 S. E. 541. In addition, In re Campbell's Estate 108 P. 669 where petitioners' claimed a share of the estate based on their birth during marriage by cohabitation and repute between decedent and their mother, the contestants claimed decedent formally married during petitioners' mother's lifetime. The Court held at page 675:

". . . if it be insisted that a marriage arose from cohabitation and repute, this presumption is removed by proof of decedent's (sic) formal and lawful marriage in this State . . ." (citing Jones v. Jones op. cit.).

Likewise, in O'Leary v. Lawrence 113 Atl. 638 nieces and nephews disputed legitimacy of decedent's grandchild because prior to the marriage upon which heirship was claimed decedent's wife was party to a marriage by habit and repute. In denying this argument, the Court said at page 640 (4):

". . . Even if there was a presumption of marriage . . . this presumption would be overcome by the subsequent relations between her and O'Leary which would have been criminal. . . . The presumption of innocence in the second case would overcome the presumption of marriage in the first even if otherwise there were enough evidence to raise such presumption."

And finally, In re Blackhawk Estate 158 Pac. 168 (1944) where the administrator claimed the entire estate and other heirs filed a petition claiming as heirs. Their claim was allowed and from this allowance, the adminis-

trator appealed. The heirs' claim was based on the argument that the marriage between their ancestor and the administrator's ancestor was invalid as prior thereto the administrator's ancestor was party to a common law marriage of which two children were born. In reversing, the Court said at page 173 citing Jones v. Jones, 45 Md. 144; 48 Md. 391:

> ". . . The rule seems to be that the presumption of marriage from cohabitation and repute may be rebutted by evidence of separation and subsequent ceremonial marriage of one of the parties to a third person."

Also to the same effect see: In re Sloan's Estate, 50 Wash. 86; 17 LRA (NS) 960.

This rule, that where a marriage between A and B founded simply upon habit and repute, is overcome by proof of a subsequent actual marriage between A and C during the lifetime of B has as illustrated been consistently followed by the courts of appeals in many jurisdictions. Here the rule was completely disregarded by our Appellate Court despite the admission by the alleged common law wife of her ceremonial marriage in 1937, six years after she left the decedent, which marriage presisted for twenty years during decedent's lifetime and still it subsists. Petitioner asserts this ruling contrary to the holdings of courts of appeals throughout the country on the same question, entitles her to a writ of certiorari.

II

Apparently our Court of Appeals justifies its ruling, presuming a common law marriage, though it contlicts with other courts of appeals' decisions because respondent's mother had signed a waiver of all her rights as "widow" in her alleged common law husband's estate and the Court therefore was not called upon to adjudicate her status. (App. 15). This is faulty reasoning on several counts. The waiver of all her rights as "widow" is not

evidence that there was a common law marriage and this woman therefore a "widow". An opposite conclusion could just as easily have been drawn based on the abnormalcy of a person's waiving such a valuable right. In this instance her share, if held as the widow, would have been substantial. This assumption by our Court of Appeals that there was a right to have been waived is erroneous. The hub of petitioner's contention below was that no such right existed as there was no legal marriage between respondent's mother and the decedent. "Waiver is the surrender or relinquishment of an existing right." Words and Phrases, Vol. 44 (Perm. Ed.) p. 518. Further, the issue of her status is one with the issue of whether or not a valid common law marriage existed upon the resolution of which issue the basic property rights of petitioner depend. If there were no marriage respondent would not be a "child", under our law, capable of inheriting and, petitioner's claim in behalf of the estate of Theodore A. Matthews would be allowed. D. C. Code Title 18, Section 709; Title 20, Section 204. (1951.) To deprive a person of his property rights upon the waiver by some third person of his own presumed pecuniary interest amounts to a deprivation of property without due process of law. It is settled that a waiver will be inoperative or void if it infringes upon the rights of others. In Reis-Moran Lumber Company v. Putney Roofing Company, 147 S. W. 2d 172 where one of the party defendants on appeal had waived the requirement of a written notice of appeal, the other party defendant appeared specially to affirm the lower court's judgment as he had not received written notice of appeal. The court in denying appellant's plea to proceed with the appeal against this defendant said, at page 175 citing 27 R.C.L. Sec. 3, Page 907:

> ". . . a waiver is not allowed to be asserted where it would infringe upon the rights of others . . ."

In this case at the hearing on the appeal and in its decision, the Court of Appeals has allowed the waiver by

respondent's mother of all her rights as "widow" to preclude any consideration by the Court of her status which would include her subsequent ceremonial marriage to a third person during the lifetime of decedent, without benefit of a divorce. *In so doing, the Court of Appeals has affixed this waiver to defeat its consideration of the facts upon which the basic property rights of this petitioner depended. By giving this effect to the waiver of the alleged "widow" the Appellate Court under the forms of legal procedure deprived the petitioner of her property rights without due process of law as the Court of Appeals thereby refused to even consider the merits of her contention.** (Amendment V; Constitution of the United States). It has been held by this Court, in deciding jurisdiction in Fayerweather *v.* Ritch, 195 U. S. 276 where a contention was made that the state court's judgment was rendered without making a finding on one of the fundamental facts, at page 299:

> ". . . if it be true that the necessary result of the course of procedure in these courts was a denial of their rights . . . a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified . . . a case is presented . . ."

III

The Court of Appeals stresses the point that petitioner assumed a heavy burden for a finding against the child on the issue of legitimacy (App. 15). However, it is the law in this jurisdiction that the presumption of legitimacy arises from the proof of the basic fact that the child was born during the lawful marriage of the mother. See Note, 46 Georgetown Law Journal, 477 (1958).

Likewise in our code, Title 18, Section 196, antenuptial children are legitimated after *marriage* and the subsequent acknowledgment of the issue by the father.*

* Emphasis supplied.

In the record of this case there is evidence by affidavit from the respondent's mother (J.A. 39) who states the relationship began illicitly and his father, the decedent (J.A. 53) which amounts to a denial by the parents that they were ever married. *In this case, as argued in our first question, no marriage existed, as the presumption of a valid common law marriage was not and rebutted by the subsequent ceremonial marriage of the mother. If there were no marriage, the very root upon which the presumption of legitimacy rests, lawful wedlock, is destroyed. Petitioner contends that to have presumed legitimacy of respondent where there was no lawful marriage, was error, and a misconstruction of our local statute on legitimation of children entitling her to the issuance of this Writ of Certiorari.**

CONCLUSION

It is respectfully submitted that the questions raised herein indicate serious errors concerning: a question which a large number of courts of appeals have decided contrary to the holding in this case; in construing a waiver by one party in such manner as to deprive another party of his property rights without due process of law; and in misconstruction of our local law on legitimation of children all of which warrant the exercise by this court of its supervisory jurisdiction by issuance of a Writ of Certiorari.

Respectfully Submitted

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Of Counsel

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* Emphasis supplied.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14296

GLADYS L. MATTHEWS, Administratrix of the Estate of Theodore A. Matthews, APPELLANT,

v.

PHILLIP MATTHEWS, Administrator, Estate of Samuel Matthews, deceased, APPELLEE.

Appeal from the United States District Court for the District of Columbia

---

Decided June 26, 1958

Miss M. Wilhelmina Jackson for appellant.

Mr. Carlisle E. Pratt for appellee.

Before FAHY, DANAHER and BURGER, *Circuit Judges*.

PER CURIAM: The District Court appointed appellee administrator of the Estate of Samuel Matthews, deceased. An amended petition for letters of administration had listed the appellee and his sister as children of the late Samuel Matthews, one Irene Matthews as his widow and Theodore Matthews as his brother. The appellant, as conservator of the brother's estate, filed a petition seeking the revocation of the appointment of appellee and for the appointment of herself instead. Appellant's petition was dismissed with prejudice, and her motion for reconsideration was denied. This appeal followed.

The District Court entered findings of fact that Irene Matthews and the decedent entered into a valid common

law marriage in the District of Columbia in 1921 and that Bernice Matthews Gordon and appellee Phillip Matthews are the legitimate issue of that marriage. Appellant has attacked these findings.

The District Code provides that a "child" may be appointed administrator of the estate of a parent.[1] The Code further provides that "if there be neither widow or surviving husband, nor child . . . brothers and sisters shall be preferred."[2] Appellant has argued that there could not have been a valid common law marriage in 1921, but there was no legal impediment to the marriage of the decedent and Irene Matthews. The court found that they lived together openly and notoriously as man and wife until their separation in 1931. Phillip Matthews had lived with his parents until the date of their separation. Appellant has assumed a very heavy burden, for a finding against the child on the issue of legitimacy could properly be made only in a most exceptional case, we have pointed out.[3] Appellant relies upon the fact that some years after the separation Irene Matthews entered into a ceremonial marriage with another but we are not called upon to adjudicate her status. The record shows that she executed a waiver of all claim as "widow" to the estate of her common law husband. In other respects there are conflicts both as to the claims of the respective parties and as to the evidence offered in connection therewith. We are satisfied that the findings by the trial judge are not without substantial support in the record. They certainly have not been demonstrated to be clearly erroneous.

The orders of the District Court are

Affirmed.

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[1] D. C. CODE § 20-24 (1951).

[2] *Id.* § 20-207.

[3] Howard v. Howard, 72 App.D.C. 145, 147, 112 F.2d 44, 46 (D.C. Cir. 1940); cf. Thomas v. Murphy, 71 App.D.C. 69, 107 F.2d 268 (D.C. Cir. 1939). And see Note, *Presumptions in Domestic Relations in the District of Columbia*, 46 Geo. L.J. 474 (1958).

Filed June 26 1958 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

Admin. 92,745

No. 14,296

Gladys L. Matthews, Administratrix of the Estate of Theodore A. Matthews, Appellant,

v.

Phillip Matthews, Administrator, Estate of Samuel Matthews, deceased, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Danaher and Burger, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the orders of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal, and have execution therefor. Dated: June 26, 1958.

Per Curiam.

FILE COPY

SEP 19 1956
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 302

GLADYS L. MATTHEWS, Administratrix
of The Estate of Theodore A. Matthews, *Petitioner*,

v.

PHILLIP MATTHEWS, Administrator
Estate of Samuel Matthews, Deceased, *Respondent*.

**On Petition For A Writ of Certiorari to
The United States Court of Appeals
For The District of Columbia Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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**On Petition For A Writ of Certiorari to
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BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order of the District Court, without opinion (R. 55), has not been reported.

The opinion of the Court of Appeals (R. 73) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1958 (Pet. App., p. 14). The petition for a writ of certiorari was filed on August 23, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Where in a suit to revoke letters of administration, conferred upon respondent as a child of the deceased pursuant to a statute of Congress governing solely the District of Columbia, petitioner, as conservator and subsequently administratrix of the brother's estate, also sought appointment as administratrix of the decedent's estate; and where the District Court found from conflicting evidence that respondent is one of two legitimate issue of a valid common-law marriage entered into by the decedent, respondent's admitted father, and respondent's mother, and concluded that petitioner, pursuant to the laws of the District of Columbia Code, was not entitled to letters of administration; and where upon review the Court of Appeals held, that the record contains substantial support for the District Court's findings of decedent's valid common-law marriage to respondent's mother and respondent's legitimacy; that petition had not sustained the heavy burden assumed in her attempt to prove illegitimacy of respondent; and further that petitioner had not demonstrated the District Court's findings to have been clearly erroneous:

In the opinion of respondent, the chief question presented is whether under the particular facts of this case and the law of the District of Columbia, which is not demonstrated to be in conflict with any other federal circuit courts of appeal, the rulings of the Court of Appeals is so clearly erroneous as to constitute special and important reasons for granting a writ of certiorari?

2. Where a female, concededly respondent's mother, separated from respondent's admitted father, the deceased, after having lived in lawful wedlock under a valid common law marriage one year prior to respondent's birth and for nine years thereafter; and where respondent's mother, six years after the aforementioned separation, entered into a purported ceremonial marriage with another man:

In the opinion of appellee, the second question presented is whether adjudication of the present marital status of

respondent's mother, who waived her rights as a "widow", required to adjudicate the question of respondent's legitimacy?

COUNTER-STATEMENT OF THE CASE

In 1918, when she was eighteen years of age, Irene Matthews, mother of respondent (Phillip Matthews), rented a room in a rooming house, operated by decedent. Later, Irene Matthews was courted by decedent and in January of 1921 bore him a female child named Bernice. In the Spring of 1921, shortly after the birth of the child, Irene and Samuel (decedent) agreed to live together as man and wife and they continued to live together as man and wife for the following ten years. Decedent acknowledged the female child, Bernice, as his daughter, and on October 9, 1922, a son, Phillip Melvin Matthews (respondent and petitioner for letters of administration below) was born to the parties.

Neither party had an impediment to the ability to marry. They lived together openly and notoriously as man and wife until the date of separation. They purchased insurance, were known by their respective families, in the church, and in the community where they lived, as man and wife.

The female child, Bernice, from the time she was two years old, lived with the mother and sister of the father and was reared by them until she was twenty-one years old and married. The son lived with his parents until the date of their separation, then he went to live with his mother (R. 39).

Both children were educated in the public school system in the District of Columbia, where they were registered in the father's name and as children of the father and mother (R. 40-43). The 1930 Census record verified that Irene and Samuel lived at their residence as man and wife (R. 43-44) during the lifetime of the decedent, respondent was appointed conservator of his father's (now decedent's) person and estate. The application for conservatorship was con-

tested by the same petitioner herein on the basis that respondent was not the legitimate son of Samuel. A Guardian Ad Litem was appointed, whose report included an investigation of the legitimacy of respondent and his sister, and said report was in support of legitimacy. (R. 32 and 38.)

Many other persons swore to knowledge and reputation of the marriage and respondent's legitimacy (R. 22-30, 45-52.)

Upon the death of Samuel Matthews, respondent filed a petition for appointment as administrator, and again petitioner challenged the legitimacy of respondent and filed a petition to revoke the letters and to have herself substituted as administratrix.

This matter was heard on July 24, 1957 and the petition to revoke was denied with prejudice (R. 55). Petitioner thereafter filed a motion to reconsider on August 1, 1957 (R. 56). Respondent filed his reply to the motion to reconsider on August 8, 1957 (R. 66). On October 1, 1957, the motion to reconsider was denied.

Appeal was taken and on June 26, 1958, the United States Circuit Court of Appeals for the District of Columbia Circuit in a *per curium* opinion, affirmed the order of the District Court.

ARGUMENT

The petition for writ of certiorari contends that the writ should issue upon three alleged grounds: (1) that the Court of Appeals' concurrent view sustaining respondent's legitimacy ensuing from a valid common-law marriage is contrary to other "courts of appeals" (Pet. 10); (2) a failure of the Court of Appeals to adjudicate the status of respondent's mother allegedly altered by a ceremonial marriage subsequent to the common-law marriage resulted in petitioner being deprived of property without due process of law; and (3) the Court erred in its decision because a common-law marriage did not exist between decedent and respondent's mother, and there was no subsequent acknowl-

edgment of respondent by the decedent allegedly required for a determination of respondent's legitimacy. These contentions are dealt with, hereinafter, *ad seriatim*.

1. More specifically as to contention (1), the petition, in effect, asserts that the Court of Appeals *presumed* a common-law marriage existed between respondent's mother and father and then failed to apply an alleged presumption flowing from a purported ceremonial marriage of respondent's mother to a third person, entered into some fifteen years after the still contested common-law marriage (Pet. 7, 10). At the outset, it must be noted that this contention is predicated upon two erroneous assumptions.

There can be no doubt that neither the District Court nor the Court of Appeals *presumed*[1] a common-law marriage existed between decedent and respondent's mother. The respective courts decided a factual question presented by petitioner upon her burden of proving the illegitimacy of respondent, and upon rebuttal evidence presented by respondent. Under well established law in the District of Columbia,[2] the overwhelming evidence presented by respondent,[3] prescinding from petitioner's burden, clearly

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[1] This assumption appears in each of petitioner's arguments. Argument I, pp. 6, 7; Argument II, p. 10; Argument III, p. 13.

[2] An agreement between a man and woman to be husband and wife, consummated by cohabitation as such, constitutes a valid common-law marriage in the District of Columbia. *Hoage* v. *Murch Bros. Const. Co.*, 60 App. D.C. 218, 50 F.2d 983, 985 (1931). It has *not* been stated by the Court of Appeals that such circumstances give rise to a mere presumption where the man and woman are competent to marry. See also *Thomas* v. *Murphy*, 71 App. D.C. 69, 107, F. 2d 268, 269 (1939). Where, because of death of one of the parties the agreement cannot be proved by testimony from each, this Court in deciding a *direct* appeal from the then Court of Appeals of the District of Columbia, did not equate the lower courts' findings of a valid common-law marriage with a presumption thereof. *Travers* v. *Reinhart*, 205, U.S. 423, 436-444 (1907).

[3] Respondent's evidence consisted of affidavits of respondent's mother (R. 39); respondent's sister (R. 46-48); the brother of respondent's mother (R. 48-49); the sister of respondent's mother (R. 52-53); a daughter of respondent's mother (R. 49-51); and from ten other persons, friends and neighbors (R. 22-31. 45-46); report of the decedent's guardian ad litem (R. 32-34); Census records of 1930 (R. 43-45); records on respondent and his sister from the District of Columbia Public Schools (R. 40-43); and a birth certificate of respondent (R. 60).

establish that respondent is the legitimate issue of a common-law marriage entered into between decedent and respondent's mother a year before respondent's birth. In addition to respondent's authoritative evidence, the additional heavy burden casted upon petitioner by the law of the District of Columbia—creating a presumption in favor of respondent's legitimacy[4]—leaves no question as to the validity of the two concurring views in the courts below.

Moreover, a review of the cases relied upon by petitioner for support of her contention—that a subsequent ceremonial marriage of respondent's mother precluded a finding of a valid common-law marriage and respondent's ensuing legitimacy—discloses that such cases are not in accord with the facts of the instant case, and as such are not applicable. The cases petitioner contends are in point had for decision, competency to marry, capacity, the status of competing *spouse*, or competing *issue* from two alleged marriages where the decedent father, before his demise, had married twice.[5] In the instant case, we have neither a question of capacity, competency, or two purported marriages of the decedent, nor do we have competing issue. The fact that respondent's mother embarked upon a ceremonial marriage years after the common-law marriage was unquestionably in existence could have no effect upon the latter's validity and respondent's ensuing legitimacy.[6] This, the Court of Appeals so held when it stated it was not called upon to decide the validity of the subsequent ceremonial marriage entered into by respondent's mother (R. 15)

Further, petitioner's second assumption[7] that conflicts between one "court of appeals" and another "court of appeals" (Pet. 10), as used in Rule 19 (1) (b) of this

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[4] *Howard* v. *Howard*, 72 App. D.C. 145, 112 F.2d 44, 46 (1940).

[5] See respondent's Argument 4 for an analysis of petitioner's cases.

[6] See *Carter* v. *Graves*, 206 Ga. 234, 56 S.E. 2d 917, (1949), distinguishing *Jenkins* v. *Jenkins*, 83 Ga. 282, 9 S.E. 541 (1889) and *Norman* v. *Goode*, 113 Ga. 121, 58 S.E. 317 (1901), improperly relied upon by petitioner.

[7] Petitioner's first assumption is referred to at page five, *ante*.

Court, means other than between federal circuit courts of appeals is clearly erroneous. From the unambiguous language of the Rule, the phrase "court of appeals" refers only to federal circuit courts of appeals.[8]

From the foregoing, nothing is plainer than that the instant case is a decision resting upon the common-law of the District of Columbia, concerns the probate laws of the District of Columbia, and is not in conflict with any federal circuit courts of appeals. The concurrent views of the District Court and the Court of Appeals represent factual determinations upon the particular circumstances of the instant case as required by the Court's prior interpretation of the common-law and purely local law, enacted by Congress solely for the District of Columbia.

What this Court stated in *Fisher* v. *United States*[9] is apposite here and dispositive of the instant petition:

> "Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. *District of Columbia* v. *Pace*, 320 U.S. 698, 702, 88 L. ed 408, 410 . . .; *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72, 74, 75, 89 L. ed 78, 79, 80 . . . *The policy of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District.*" (Italics supplied.)

2. Petitioner asserts the "chief issue" raised in her suit to revoke letters of administration granted to respondent, and for her appointment as administratrix, was whether respondent was a legitimate issue of Samuel Matthews so as to entitle him to letters of administration on the estate of the latter (Pet. 6). Respondent submits that was the *sole* issue.

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[8] See *Sanford* v. *Kepner*, 344 U.S. 13, 14 (1952); *United States* v. *Nugent*, 346 U.S. 1, 5 (1953) wherein this Court, referred to seeming conflicts between federal circuit courts of appeals used the phrase "Courts of Appeals". See also Rule 38 (5) (b), the predecessor of Rule 19 (1) (b), which employed the language of "circuit court of appeals".

[9] 328 U.S. 463, 476, 477 (1946).

The record reflects that the courts below decided the factual issue adversely to petitioner upon persuasive evidence.[10] The opinion of the Court of Appeals reflects that it reviewed the entire record, especially in concluding,

> "We are satisfied that the findings of the trial judge are not without substantial support in the record."

Therefore, the Court necessarily held that the subsequent ceremonial marriage by respondent's mother did not invalidate the prior valid common-law marriage[11] and respondent's ensuing legitimacy. Obviously, the Court alluded to the "waiver" executed by respondent's mother because the latter was not a party competing for letters of administration and a determination of her present marital status was unnecessary for decision. Since the Court was not compelled to go farther than the controversy before it,[12] and substantial evidence supports the facts resolved, the Court of Appeals did not deprive petitioner of due process of law.

3. Petitioner's third contention is precisely the same as her first; only the conclusions differ. Petitioner's conclusion that the decision of the Court of Appeals is "error and a misconstruction of our local statute on legitimation of children entitling her to the issuance" of a writ of certiorari is itself unsupported by any judicial authority (Pet. 13). Suffice it to add that 18 D.C.C. § 106 was not applicable in the instant case and was not applied by the Court of Appeals, because respondent was born legitimate issue to a valid common-law marriage already in existence one year at the time of his birth. The fact that the Court relied upon *Howard* v. *Howard, supra,* for the normal presumption attending postnuptial children, and did not cite 18 D.C.C. § 106, is conclusive.

4. The Petitioner argues that respondent's mother abandoned the common-law marriage and fifteen years

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[10] See footnote 3, *ante.*

[11] *Carter* v. *Graves, supra.*

[12] *Barker Painting Co.* v. *Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America,* 281 U.S. 462 (1930).

later entered into a ceremonial marriage with another, and this fact controverted the existence and validity of the prior common-law marriage. Respondent urges upon the Court that this is not a correct statement of law and the cases presented by petitioner do not support this proposition.

Petitioner relies upon *Jones* v. *Jones*, 48 Md.St.Rep. 391 (1878), which is a case where the parties to the suit were claiming adverse interests arising out of two *competing* marriages. In the case at bar, there is no *competing* marriage. There is no one claiming an interest arising from a second or subsequent marriage.

In re *Blackhawk's Estate*, 195 Okl. 390, 158 P.2d 168 (1930)—In this case, there was an effort to invalidate a second marriage and thereby bastardize its issue. In sustaining legitimacy, the Court held that in order to invalidate a second marriage formerly entered into and proven in actual fact, there must be actual, as distinguished from presumptive proof of first marriage.

In the case at bar, respondent offered actual proof as well as circumstantial proof of the validity of his parent's marriage, and the Court of Appeals expressly and correctly stated that the present validity or status of the so-called second marriage was in no way germane to the issues.

In the case of *O'Leary* v. *Lawrence*, 138 Md.Rep. 147, 113 Atl. 638 (1921), the Court, in upholding legitimacy, said at page 640,

> "Unfortunately there is no positive and direct proof of a marriage between defendant and the woman with whom he lived for more than twenty-five years . . . so we are largely left to legal presumptions . . ."

In the case at bar, petitioner ignores the fact that there was direct proof of the marriage.

The case of *Gaines* v. *Relf*, 12 How. 472, 53 U.S. 472 (1841), is not in point, because there the Court was dealing with the impediment of an existing marriage at the time of the alleged marriage. In the case at bar, there is no

question concerning the capacity of the parties to contract a marriage.

In the case of *In re Maher Estate*, 56 N.E. 124, 183 Ill. 61 (1899), three women claimed to be the lawful widow of the testator. One relied upon a common-law relationship. She lived with testator and they held themselves out as man and wife; but in this relationship she did not use his name, held herself out as *being single*, and it was evident that they *intended* at some future date to get married. The court simply held:

> "A presumption of that character (hold out and repute) may be overcome by other presumptions which spring from the acts of the parties. . . ."

In re *Sloan's Estate*, 50 Wash. 86 (1908)—The court said at page 89,

> ". . . The presumption which attaches to the second marriage, however, *only* overcomes a presumption of marriage arising from reputation and cohabitation, and is not sufficiently strong to overcome such proofs of marriage as are found in the record." (emphasis added)

In re *Campbell's Estate*, 12 Cal. App. 707, 108 P. 669 (1910). The court said, at page 670,

> ". . . It seems to us that the question presented relates to the principles of law as established and applied to a condition of facts peculiar to the system of slavery, rather than to any controversy as to what the facts are."

It is significant that this case was decided upon a determination of the capacity of slaves to contract.

See also *McMillan* v. *Grier*, 85 Cal. App. 558, 259 P. 995 (1927), where the *Campbell* case was expressly overruled. Here, the Court said that the issue of the Campbell marriage should have been declared legitimate under a statute that legitimated marriages null and void, thereby inferentially concluding that the evidence was adequate to support a valid common-law marriage, and that the Court would

have done so but for its oversight in failing to apply the statute concerning capacity of the parties to contract.

In the case of *Norman* v. *Goode*, 113 Ga. 121, 38 S.E. 317 (1901), the party claiming as a surviving spouse had been married six times. There again the question presented was the capacity of the parties to contract. The case of *Jenkins* v. *Jenkins*, 9 S.E. 541, 83 Ga. 282 (1889), the court held:

> "The true doctrine of the authorities is that where two alleged marriages compete, and one of them is proved as a fact, whether by direct or circumstantial evidence, the other cannot be left to stand upon the mere legal presumption founded on cohabitation and repute . . . where no *competing* actual marriage is proved, the law presumes marriage from cohabitation and repute but this presumption the law declines to rest in opposition to a competing marriage actually proved." (Emphasis added)

In all of the cases relied upon by appellant, there were claimants from two marriages claiming an interest and, as a consequence, the two marriages were in direct competition. In the case at bar, the surviving spouse has waived her interest, there are no parties in interest from the second marriage of the surviving spouse, decedent never remarried, and the only question before the Court was the legitimacy of issue.

The two preceding cases relied upon by petitioner were referred to in the case of *Carter* v. *Graves*, 56 S.E. 2d 917, 206 Ga. 234 (1949), where the court said:

> "Caveator takes the position that, he having shown a ceremonial marriage with testatrix, evidence to establish a previous common-law marriage by caveator was not admissible. In support of his position, he relies upon *Jenkins* v. *Jenkins*, 83 Ga. 282, and *Norman* v. *Goode*, 113 Ga. 121, 38 S.E. 317. These cases do not so rule, but merely hold that, where a ceremonial marriage has been shown, it will prevail over the presumption of law that a marriage has taken place founded on cohabitation and repute. In other words, they hold that, where no competing actual marriage is shown,

but there is cohabitation and a reputed marriage, the law presumes a marriage; but that this presumption cannot prevail where a ceremonial marriage is, in fact, established. [Such ruling has no application where a ceremonial marriage has been shown, and where by facts and circumstances a previous common-law marriage may be established.] While a proven ceremonial marriage will prevail over a presumption of marriage founded on cohabitation and repute, yet such a ceremonial marriage will not prevail over a properly proven previous common-law marriage."

In *Schwingle* v. *Keifer*, 105 Tex.Rep. 609, 135 S.W. Rep. 194 (1913), the Court said:

". . . And it also appeared that there was an understanding between her and deceased that they would separate when either desired, and both of them acted on such understanding thereafter, an instruction that a marriage agreement expressed or implied, with a proviso or qualification, made at the time of entering into it, that either or both of the parties could dissolve it at will would not in law constitute a marriage contract, was not objectionable as unwarranted by the evidence . . ."

In the case at bar, there was no understanding between the parties to the marriage that they could terminate the relationship at will, but because of mistake of law by the surviving spouse she, fifteen years later, thought she could remarry without benefit of a divorce. There is no suggestion that she, or decedent, thought this at the time of the marriage. It does not seem logical that the innocent or wrongful act of a parent, fifteen years after the birth of issue, could bastardize an otherwise legitimate child.

See also in re *Tilton's Estate*, 129 Neb.Rep. 872, 263 N.W. 217 (1935), where the surviving common-law wife and daughter joined in a petition but the common-law wife later voluntarily dismissed with prejudice. The respondent pleaded that the question of the common-law marriage, upon which the daughter based her legitimacy, was res judicata. The court, in rejecting the claim, said at page 218—

> "... It would be unthinkable that the legitimacy of a daughter could be determined by her mother's disclaiming any interest in an estate. The right of heirship of a daughter is not res adjudicata by a judgment entered upon a dismissal and disclaimer filed by her mother, where allegation of the petition is that the mother is the common-law wife of the deceased."

See the case of *Howard* v. *Bank*, 21 Ohio App. 74, 152 N.E. 784 (1926), wherein the court had a similar problem presented to it and declared:

> "No Court recognizing common-law marriages would permit a husband to destroy his common-law marriage by his own adulterous career with another woman".

See also the case of *Sam* v. *Sam*, 172 Okl. 342, 45 P.2d 462 (1935), where the court held that in a case involving heirship and the right to inherit, second marriage of party to the alleged common-law marriage contract did not, under circumstances involved, overcome presumption in favor of legitimacy of issue of such prior common-law marriage.

Petitioner suggests that respondent's mother's waiver of interest in decedent's estate, and failure to get a divorce gives rise to a presumption greater than the presumption of the legitimacy of issue or the presumption of validity of marriage. "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy." See *Teter* v. *Teter*, 101 Ind. 129, 51 Am.Rep. 742 (1884).

See also *Schmeizl* v. *Schmeizl*, 184 Md. 584, 42 A.2d 106, 109 (1945), wherein the court said:

> "Concerning the presumption of marriage and legitimacy, the statement most quoted in later American cases, and also a concise statement of the doctrine of some leading British cases, are contained in the opinion of the New York Court of Appeals in Hynes v. McDermott, (1883) 91 N. Y. 451, 459, 43 Am. Rep. 677 ...
>
> "The presumption of marriage, from cohabitation, apparently matrimonial, is one of the strongest

> presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence. In Morris v. Davis (5 Cl. & Fin. 163) Lord Lynhurst, speaking of this presumption says: 'The presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive'."

Respondent urges upon the Court that the lower Court did not necessarily reach its conclusion solely upon presumptions but that there was ample proof to independently determine legitimacy of respondent.

> "So far as the former marriage, the common-law marriage, which is the contested issue in the case at bar, is concerned it is clearly proven by both direct and circumstantial evidence and being so proven, presumptions, if any, inconsistent therewith, cease to apply.. Litigants are not at liberty to rely upon presumptions against ascertained or established facts." (See *Sam* v. *Sam*, 54 P 2d 462, 172 Okla. 342.)

Finally, *Reis-Moran Lumber Co.* v. *Putney Roofing Co.*, Mo. App. 147 S.W. 2d 172, is a case dealing with necessary party defendants where one defendant independently waives a statutory right and application of the waiver is asserted against the other defendant. It is not at all in point with the case at bar.

Irene Matthews was not joined as a party to this suit, and her waiver of interest in no way diminished the estate or the interest of any of the parties. There could be no question but that her *present* status was not an issue before the Court of Appeals.

CONCLUSION

Petitioner has failed to demonstrate that the decision of the Court of Appeals is contrary to other federal circuit courts of appeals or even state courts of appeals, or that the decision is a deprivation of property without due process of law, or that there are cogent reasons for changing the local law of the District of Columbia as interpreted by the local courts for a long period of time. Nor does petitioner demonstrate any other "special and important reasons" to justify her request for a writ of certiorari.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari be denied.

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